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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-889

CHARLES E. SELLERS, JR., CHARLES SEXTON and CHARLES H. CARR,

PETITIONERS,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In permitting a search warrant to be based upon an affidavit containing conclusionary allegations of criminal activity without factual verification and without a showing of personal observation or of independent corroboration, the United States Court of Appeals for the Fifth Circuit rendered a decision which is in conflict with the constitutional mandates of the Supreme Court and one which endangers Fourth Amendment guarantees.

The construction of Title 18, U. S. C. § 1084(a) by the Fifth Circuit, in holding "transmission" to include *receiving* a telephone call as well as *sending* a wire communication, is in conflict with the construction of this statute rendered by the United States Circuit Courts of Appeal and United States District Courts.

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VS.

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Charles H. Carr prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on July 26, 1973, petition for rehearing denied on November 7, 1973.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 483 F. 2d 37. The order of the Court denying rehearing is not yet reported.

The opinion of the Court affirmed the conviction of the petitioner and two others who were jointly tried

for the use of a wire communication facility for the transmission in interstate commerce of wagering information in violation of Title 18 U. S. C. § 1084(a).

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 26, 1973, petition for rehearing denied on November 1, 1973. Jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

I.

Does an affidavit in support of a search warrant which is based upon information from an unnamed informant meet Fourth Amendment requirements when (1) the affidavit fails to allege personal observation or personal knowledge on the part of either the affiant or the unidentified informant; (2) the affidavit fails to explain how, or from whom the informant came by his information; (3) the affidavit fails to show independent corroboration by the affiant or by any other source and (4) the assertions of the informant are conclusionary in nature and for all that appears from the affidavit came from an unidentified third party?

II.

Is "sending" an interstate telephone communication, and not "receiving", the "transmission" required in the knowing use of an interstate wire facility under Title 18 U. S. C. § 1084(a)?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioner, Charles H. Carr, was indicted jointly with Charles E. Sellers and Charles Sexton on September 14, 1972 for the substantive offense of knowingly using a wire-communication facility, that is a telephone, for the transmission in interstate commerce from Kosciusko, Mississippi to Prattville, Alabama, of wagering information in violation of Title 18 U. S. C. § 1084.

Prior to trial, petitioner Carr made a motion to suppress evidence obtained in a March 3, 1972 raid of a residence in Prattville, Alabama. The United States District Court, following an evidentiary hearing, denied the motion on the merits and the evidence seized was subsequently introduced at trial over the objection of the petitioner. During the evidentiary hearing on the motion to suppress it was established that all of the information contained in the affidavit supporting the search warrant was supplied by an unidentified informant. It was shown during the evidentiary hearing by the testimony of a federal agent, Mr. Carmelo Graffagnini, that he was the informant in the affidavit and that prior to the search in ques-

tion he had information "that caused me to suspect that there was a violation" - only a suspicion. The Government made no challenge in the District Court to the standing of petitioner Carr to raise his Fourth Amendment claim.

The petitioner, Charles H. Carr, was tried on November 30 and December 1, 1972 jointly with Charles E. Sellers and Charles Sexton in the District Court. Petitioner Carr was convicted by a jury on all counts (with the exception of Count XII which was dismissed) as were Mr. Sellers and Mr. Sexton. After the jury verdict and prior to sentencing, petitioner Carr filed motions for mistrial, for a new trial and for a judgment of acquittal notwithstanding the verdict. All of these motions were denied by the District Court. The United States District Court on December 13, 1972 adjudged the petitioner, Carr, guilty and assessed punishment at three years imprisonment and a $10,000.00 fine.

The petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court as set forth above.

REASONS FOR GRANTING THE WRIT

I.

IN PERMITTING A SEARCH WARRANT TO BE BASED UPON AN AFFIDAVIT CONTAINING CONCLUSIONARY ALLEGATIONS OF CRIMINAL ACTIVITY WITHOUT FACTUAL VERIFICATION AND WITHOUT A SHOWING OF PERSONAL OBSERVATION OR OF INDEPENDENT CORROBORATION, THE UNITED

STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT RENDERED A DECISION WHICH IS IN CONFLICT WITH THE CONSTITUTIONAL MANDATES OF THE SUPREME COURT AND ONE WHICH ENDANGERS FOURTH AMENDMENT GUARANTEES.

The Court of Appeals below makes an unprecedented and far-reaching pronouncement in the area of Fourth Amendment rights by allowing allegations of credibility of an unidentified informant to dilute and in effect to supplant the quantum of underlying circumstances necessary to reveal the source of the informant's knowledge. The Court of Appeals eliminates the independent corroboration requirement in cases where search warrant affidavits fail to explain or detail the underlying circumstances as to how an unnamed informant gained his information. This petitioner respectfully submits that the opinion of the Court of Appeals is contrary to the constitutional mandates contained in the Supreme Court decisions of Jones;[1] Aguilar;[2] Spinelli;[3] and Harris.[4]

The Court of Appeals has allowed an informant's conclusion of criminal conduct to be corroborated by other conclusions from the informant and with-

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1. *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697.

2. *Aguilar v. Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723.

3. *Spinelli v. United States*, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637.

4. *United States v. Harris*, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723.

out any claim of personal observation. The affidavit, *sub judice* fails to contain any detailed information as to the premises searched or as to gambling equipment, furniture or appointments on the premises. Telephone numbers are alluded to in the affidavit, but there are absolutely no details given with regard to dates, times or circumstances of calls, the purpose of which are alleged in conclusionary fashion. For all that appears from the affidavit the information contained therein in all likelihood came from an unidentified third person. The instant affidavit is entirely lacking in factual allegations from which it could reasonably be determined that the informant had gained his information in a reliable way.

THE AFFIDAVIT

In support of the application for a search warrant an Alabama law enforcement officer, Capt. W. B. Painter, swore out an affidavit before the County Judge of Elmore County, Alabama which contains the following language:

> "Affiant further says that he has probable cause to believe the above-listed property to be searched for and seized is now located upon said described premises, based upon the following facts: Information is that Charles Sellers is operating book from his residence located at 243 Murphy Drive, Prattville, Alabama. He has two telephones listed from this residence as follows: # 365-6461 and # 365-8657. Information REFLECTS THAT # 365-8657 is apparently used for the bookmaking operation.
>
> Toll calls have been made from this number to telephone number 853-1252 in Birmingham fre-

quently during recent months. Telephone number 853-1252 is in the name of Michael Canon, 1120 B. Florentine Circle, Birmingham, Alabama. This number is an unlisted number. Canon also has telephone service through # 853-8751 and Canon is a known gambler.

Telephone number 322-6928 has been called frequently from Charles Sellers residence number. This number is in the name of Anthony Ippolito at 2646 Milner Court, Birmingham, Alabama. Ippolito also has # 324-7195. Frequent calls have been made from telephone number 365-8657 to telephone number 853-8751 in Birmingham.

Information is that Canon and Ippolito are furnishing the line to Charles Sellers on basketball games at the present and on football and baseball games during the season. Sellers in turn furnishes the line to local bookmakers in the Montgomery area. Canon and Ippolito reportedly are handling layoffs for Charles Sellers.

The above information was supplied by an informant who has given reliable information in more than one hundred instances in matters of investigation."

It is apparent that the affidavit, while attesting in the last paragraph thereof to the credibility of the informant, totally fails to set forth facts or underlying circumstances as to how the unidentified informant gathered his information. Personal observation or personal knowledge on the part of either the informant or the affiant is not even attempted to be shown. The affidavit therefore fails to meet the requirements set forth by this Court in *Aguilar*

v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723.

It is equally apparent that the affidavit fails to show that the informant's tip was corroborated in any degree by independent sources. The magistrate in this case could not have been able to determine that independent corroboration added to the report or made the report as trustworthy as one which would satisfy *Aguilar* without independent corroboration. *Spinelli v. United States*, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637.

The opinion of the Court of Appeals recognizes that the affidavit does not set forth any source of the informant's information and thus does not meet the "underlying circumstances" requirement of *Aguilar v. Texas*, supra.

The Court of Appeals in holding that neither allegations of personal observation nor of independent corroboration are necessary for the sufficiency of the instant affidavit, relies on "sufficient detail" as the basis for crediting the informant's hearsay. By reference to the alleged credibility of the informant, the Court of Appeals has effectively eliminated the requirement of meaningful and substantive corroborative detail and has permitted conclusion to be verified by conclusion.

The Court by footnote observes "as it turns out, the unnamed informant was a special agent of the Federal Bureau of Investigation." This was brought out during the very suppression hearing wherein this informant specifically acknowledged that he had "information that caused me to suspect that there was a violation" and that this was based only on sus-

picion. In any event neither the identity of the informant nor his suspicion was brought before the magistrate, and it is well settled that an affidavit for a search warrant must be tested within the four corners thereof. *Giordenello v. United States*, 357 U. S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503. The circumstances surrounding this affidavit emphasize the wisdom of the caveat of the Supreme Court in *Aguilar*, supra:

> "To approve this affidavit would open the door to easy circumvention of the rule announced in Nathanson and Giordenello. A police officer who arrived at the 'suspicion', 'belief' or 'mere conclusion' that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had 'received reliable information from a credible person' that the narcotics were in someone's possession." (12 L. Ed. 2d at p. 728 N. 4)

The allegations by the informant here as to "reported" layoffs, "apparent" gambling operations and furnishing of the "line" by their very nature are especially susceptible to suspicion, surmise and conjecture. *Aguilar v. Texas*, supra; *Spinelli v. United States*, supra.

No matter how reliable an informant himself might be, the constitution requires more than his suspicion to support the issuance of a search warrant. If this informant actually had personal knowledge of criminal activity, this so easily could have been stated in the affidavit. On the other hand, if the affidavit was based on suspicion or upon information from an unidentified third party, it is clearly unacceptable.

To approve an affidavit such as the one *sub judice* is to open wide the door for rumor or suspicion from one unknown informant to be "verified" by the same rumor or suspicion from another unknown informant.

In *Spinelli v. United States*, supra, Mr. Justice Harlan indicated that independent corroboration may serve to credit hearsay from an unidentified informant. For example, as seen in *Draper v. United States*, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959), findings of probable cause were supported and corroborated by independent investigation by the affiant or by other law enforcement officials after the informant's tip was received.

The benchmark definition of the "sufficient corroborated detail substitution" is found in *Draper v. United States*, supra. There the Court found the informant's tip to be sufficient due to the following detail of information and corroboration:

1. Draper had gone to Chicago on September 6, by train from Denver and was going to bring back three ounces of heroin;

2. Draper would return by train to Denver on the morning of September 8 or 9;

3. Draper was a Negro of light brown complexion, twenty-seven years of age, five feet eight inches tall, weighed about 160 pounds; he was wearing a light color raincoat, brown slacks and black shoes; he would be carrying a tan zipper bag; and that he habitually walked fast.

The corroboration of this informer's intricately detailed tip was as follows:

1. The police went to the train station in Denver on September 8, but did not see Draper;

2. On the morning of September 9, police saw a Negro man, having the exact physical attributes and wearing the precise clothing described by the informer, alight from an incoming Chicago train carrying a tan zipper bag and begin to walk fast toward the exit.

The substantive intricate detail found in Draper is simply not contained in the affidavit now before the Court.

The Court of Appeals relies on detail given by the informer to support "an inference" that the informer had personal knowledge of criminal activity. These "details" are conclusionary in nature and are without substantive or factual verification, i. e.—"information is that Charles Sellers is operating book;" "information reflects" that a phone number "is apparently used for bookmaking operation;" "Canon is a known gambler;" "information is that Canon and Ippolito are furnishing the line;" "Canon and Ippolito reportedly are handling lay offs."

These purported details do not even attempt to corroborate the informant's conclusions from any independent source. Thus what the informer himself said he heard is allowed by the Court below to credit the hearsay from the informer with no showing as to where or from whom the information was gathered.

We do not urge a hypertechnical construction of the instant affidavit. To the contrary, we ask that the affidavit be weighed against the recognized standard that probable cause must be determined by:

"A neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U. S. 10, 14, 92 L. Ed 436, 440, 68 S. Ct. 367; *Giordenello v. United States,* 357 U. S. 489, 2 L. Ed 2d 1503, 1509, 78 S. Ct. 1245.

If it may be so easily inferred from the affidavit that the informant had personal knowledge of criminal activity, why should not the substantive fact of such personal observation be set forth in the affidavit. This requirement could cause no possible harm and would eliminate the danger of one policeman's suspicion being used to obtain a warrant for another law enforcement officer's search. We urge no hardship on law enforcement officials but only a requirement that an affiant simply state that his confidant had personal knowledge or observation if indeed such be the case. The secrecy and vagueness surrounding such affidavits as the instant one raise significant and dangerous inferences as to the illegality and unreliability of an informant's source of information.

The decision of the Court of Appeals in upholding the affidavit refers to "his wealth of information." However, the affidavit itself shows that affiant relied entirely on "information supplied" from the unnamed confidant.

The affidavit leaves totally and completely unanswered such critical questions as:

Was the information supplied to the unidentified informer by virtue of casual rumor or through bar-room suspicion?

What was the substance of the conclusion that

"Canon and Ippolito" were furnishing the "line" and handling "lay offs"?

What are the substantive details and factual foundations for these conclusions of "furnishing the line" and handling "lay offs"?

When did the informant receive or learn of this information?

When did the informant relate the information to the affiant?

Were the conclusions that "Canon is a known gambler" and the phone "is apparently used for the bookmaking operation" mere affirmance of belief or suspicion?

Did the informant learn of the information contained in the affidavit through an illegal wire tap or by other illegal means?

The answers to these critically important questions are not to be found within the four corners of the affidavit. These answers are not shown to have been within the affiant's "wealth of information" and were not presented to the issuing magistrate.

The Court of Appeals holds that the issuing magistrate "could reasonably have inferred probable cause" from the details of the affidavit. The Court was forced to so conclude in order to affirm, in that the instant affidavit clearly fails to meet the "underlying circumstances" requirement of *Aguilar*. The "details" as set forth in the affidavit do not pass constitutional and judicial scrutiny—the affidavit is replete with such statements as "information reflects," "apparently," "reportedly." The details set forth in the instant affidavit are strikingly similar to those

held to be insufficient in *Spinelli v. United States*, supra.

In further analysis of the "sufficient corroborative detail test" as a substitute for the "underlying circumstances" requirement of *Aguilar*, the Supreme Court has noted an example of insufficient detail in the affidavit of *Spinelli* where, although there was detailed information in the affidavit, some of which was corroborated, this factual detail, as opposed to conclusionary averment, was not concerning criminal conduct. The allegations of criminal conduct in the *Spinelli* affidavit were based solely on the bald, unsupported supposition that Spinelli was operating a bookmaking business by the use of specified telephone numbers and upon the unsupported and undetailed opinion of the affiant . . . "that Spinelli was a 'gambler' and an 'associate of gamblers.' "

In the affidavit *sub judice* as in Spinelli, there is some reference to specific telephone numbers being registered in the names of certain persons and to the specific residence of one of the defendants. As previously noted however, although telephone calls are mentioned here with conclusions of illegal activity in connection therewith, there are absolutely no details given with regard to the dates, times or circumstances of the alleged calls from which self-verification of the affidavit could have been reasonably determined.

In *Spinelli* there was at least some attempt at corroboration by independent investigation of suspicious conduct. Here no such investigation is alleged. In *Spinelli* the affidavit held to be insufficient contained conclusionary allegations that two telephones at the same apartment were used for gambling purposes to-

gether with conclusionary allegations that Spinelli was a known gambler and an associate of bookmakers and gamblers. Here there are similar conclusionary allegations except the terms "lay off" and furnishing the "line" are substituted terms for "known bookmakers" and "known gamblers." This can hardly supply the detail envisioned in *Spinelli* or *Harris*. This Court significantly observed in *Spinelli*:

> ". . . We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable." (21 L. Ed 2d at 643-644)

The conclusions set forth in the affidavit, *sub judice*, could well have originated by rumors circulating in the underworld or by accusations based merely on an individual's general reputation. In *United States v. Harris*, supra, this Court in its most recent pronouncement on the subject clearly recognized the requirement that an affidavit in support of a search warrant contain substantial basis for crediting the hearsay and in discussing the validity of a search warrant affidavit the Court specifically noted:

> "The substance of the tip, held sufficient in *Jones* closely parallels that here held insufficient by the Court of Appeals. Both recount *personal and recent observations by an unidentified informant* of criminal activity, factors showing that the information had been gained in a reliable manner, and serving to distinguish both tips from that held insufficient in *Spinelli*, supra, in which the affidavit *failed to explain how the informant came by his informa-*

tion." (Emphasis added) (29 L. Ed. 2d at p. 731, see also 29 L. Ed. 2d at pp. 732-733.)

We suppose that the opinion below makes reference to "inferences" because the affidavit fails to set forth factual detail—thus deduction is required. The detached and impartial issuing magistrate of Elmore County, Alabama, was indeed faced with quite a feat of deductive reasoning as opposed to an analysis of detailed factual statement. The magistrate must have made at least the following assumptions, inferences or deductions *before* being able to infer "that sufficient probable cause was shown":

1. That the informant either had personal knowledge or that the informant had access to and has examined telephone survey records.

2. That the telephones set forth in the affidavit were in fact used for the transmission of gambling information.

3. That the informant gained access to the telephone survey records in a legally permissible manner.

4. That the informant gained his information through means other than illegal wire tap.

5. That the informant gained his information as to reported "lay offs" and apparent "line furnishing" from sources other than casual rumor or general reputation.

6. That the information was supplied to the informant within a permissibly recent time frame.[5]

7. That the opinion of the informant that Canon

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5. *Aguilar v. Texas*, supra

was a "known gambler" was a substantial one and more than surmise or conjecture."[6]

8. That the informant received his information from someone who was reliable or from a legal and reliable source.

9. That the hearsay from the informant was based on reliable hearsay from another.

10. That the two telephones in the Prattville, Alabama, and Birmingham, Alabama, residences constituted an unusual number of phones and abnormal telephone activity.[7]

11. That the statements concerning the "line furnishing" or "handling of lay offs" were not bald conclusions by the informant but were rather a personal observation or investigation or based on credible hearsay and constituted more than police suspicion.

We respectfully submit that it is unreasonable and totally unrealistic to assume that the issuing magistrate in this case engaged in the strained logic and reason attributed to him by the Court below. Albeit, to reach an inference or deduction of probable cause upon the affidavit *sub judice* would require far more than could reasonably be expected from a "neutral and detached magistrate."

II.

THE FIFTH CIRCUIT, IN HOLDING "TRANSMISSION" UNDER TITLE 18, U. S. C. § 1084(a) TO INCLUDE RECEIVING AS WELL AS

6. *Spinelli*, supra.
7. *Spinelli*, supra

SENDING A COMMUNICATION, RENDERED A DECISION IN CONFLICT WITH OTHER UNITED STATES CIRCUIT AND DISTRICT COURTS.

Title 18, U. S. C. § 1084(a) makes unlawful the knowing use of a wire communication facility for the transmission in interstate commerce of bets or wagers on any sporting event. The key element of § 1084(a) which there has been lack of unanimity among circuits is the meaning of "transmission" required for a violation of this section.

The Fifth Circuit's opinion in the instant case is in direct opposition to the well-reasoned three-judge opinion of *Telephone News System, Inc. v. Illinois Bell Telephone Company*, 220 F. Supp. 621 (N. D. Ill. 1963) affirmed 376 U. S. 782, 84 S. Ct. 1134, 12 L. Ed 2d 83 which held:

> "We must reject the theory that 'transmission' as used in subsection (a) means sending *or* receiving. Whatever validity there might be to the argument that 'transmission,' in some contexts, has a meaning broader than the term 'sending,' it is plain that Congress meant it as 'sending' in this statute (18 U. S. C. § 1084(a)). Subsection (d) uses the term 'transmitting or receiving' and it is logical to suppose that Congress would not have used both terms in both subsections had it meant to include 'receiving' in subsection (a). We shall not assume that 'transmission' has one meaning in subsection (a) and another in subsection (d), nor that 'receiving' in subsection (d) is superfluous." 220 F. Supp. at 638 (Emphasis added)

The Seventh Circuit cited the *Telephone News* con-

struction of "transmission" under § 1084(a) in *United States v. Stonehouse*, 452 F. 2d 455 (1971), and applied the requirement of "sending" a communication in reversing a conviction where a ticker tape was the means of communication which, by its nature, could only receive. While *United States v. Stonehouse*, supra, involved a ticker tape machine, it cited as authority for its decision *Telephone News*, supra, and rejected the construction of § 1084(a) under *Sagansky v. United States*, 358 F. 2d 195, (1 Cir. 1966), Cert. denied 385 U. S. 816, 87 S. Ct. 36, 17 L. Ed 2d 55. Both *Telephone News* and *Sagansky* involved the telephone as a means of communication.

The Fifth Circuit rejected the *Telephone News* and *Stonehouse* construction of § 1084(a) in the instant case and followed *Sagansky v. United States*, supra which stated:

> "When a person *holds himself out as being willing to make bets or wagers over interstate telephone facilities*, and does, in fact, accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of the statute to hold that he has 'used' the facility for the transmission of bets or wagers." (Emphasis added) 358 F. 2d at 200

It must be noted however that *Sagansky*, supra, did not offer a construction of "transmission" under § 1084(a) different from *Telephone News*, supra, which it failed to cite, but merely applied "use of the facility" to include receiving as well as sending bets or wagers. *United States v. Stonehouse*, supra, in rejecting the *Sagansky* construction of the statutory phrase "for the transmission in interstate or foreign commerce of bets or wagers" stated at page 457:

"It, (the Government) contends that the statutory phrase 'for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers . . .' modifies the noun 'facility' rather than the verb 'uses'. This is not a tenable interpretation of the section. Unless the phrase modifies the verb, a professional gambler would violate § 1084(a) whenever he made an innocent use of a facility which someone else had used for an illegal purpose."

The Tenth Circuit in *United States v. Tomeo,* 459 F. 2d 445, (1972) followed *Sagansky* in extending § 1084(a) to include receiving as well as sending a communication of wagering information but both limited this extension to cases where the professional gamblers were "holding themselves out as being willing to make bets or wagers over interstate telephone facilities."

There is no denial that petitioners were conducting a state football and basketball betting operation (See *Grimes v. United States,* 379 F. 2d 791, (5 Cir. 1967) Cert. denied, 88 S. Ct. 104, 389 U. S. 846) but the record is void of any evidence showing that they held themselves out as "being willing to make bets or wagers over the interstate telephone facilities." (281, 292, 302) As a matter of fact none of the telephone numbers or addresses found during the search were outside of the State of Alabama with the single exception of the address of Jay Swindle of Kosciusko, Mississippi.

Swindle testified that he had never told the person on the other end of the phone while making bets that he was in the State of Mississippi, (325) and that he had dialed direct every time he called the Alabama number. (325)

It is difficult to conceive how the receipt of a direct-dialed long-distance telephone call would be sufficient evidence to establish the prerequisite under *Sagansky* as "holding out to be willing to make wagers over interstate facilities."

Clearly there is a substantial conflict among the circuits as to the transmission or communication required for a violation of § 1084(a). However, it must be remembered, this statute requires a knowing use of the interstate facility in transmitting wager information and thus the *Telephone News* and *Stonehouse* construction of the statute appears most logical, reading the statute in its entirety, for the party initiating the direct-dialed phone call, thereby being the sender under § 1084(a), would be the only one to *know* that interstate transmission was being utilized. The *Sagansky* and *Tomeo* interpretation of § 1084(a) envision the continuous, every-day type of "holding out to be willing to make wagers over interstate facilities," in addition to wager information being supplied from the recipient of the phone call to the initiator of the phone call. The lack of evidence substantiating the proposition that this petitioner was holding himself out to be willing to make wagers over interstate facilities is clearly stated above. However, even under the *Sagansky* and *Tomeo* construction of the communication necessary for a violation, there must be transmission of information from the recipient to the initiator of the phone call. The record is completely void of any evidence showing a communication of wagering information from the petitioner, as the alleged recipient of the phone call, to the initiator who direct-dialed the phone call from Mississippi.

The instability of the interpretation of this statute

is indicated by the Eighth Circuit in *Truchinski v. United States*, 393 F. 2d 627, (1968) where the Court upheld a conviction of § 1084(a) on Count II where the defendant initiated the telephone call but neither affirmed nor reversed the conviction on Count I where he merely *received* the telephone call.

This petitioner respectfully submits that a decision of this Court is necessary and critically important in order to resolve conflict and apparent misunderstanding among the circuits as to the proper construction of Title 28, U. S. C., § 1084(a).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 26, 1973.

Respectfully submitted,

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December 7, 1973

APPENDIX I

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3733

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES E. SELLERS, JR., CHARLES SEXTON and CHARLES H. CARR,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

(July 26, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

CLARK, Circuit Judge: Sellers, Sexton, and Carr appeal from their convictions for the use of a wire communication facility for the transmission in interstate commerce of wagering information in violation of 18 U. S. C. § 1084(a). We find no merit in any

of the contentions raised on this appeal and therefore affirm the convictions.

Validity of the Search Warrant

The Unidentified Informer's Tip — The appellants first urge that the warrant authorizing the search of the premises on which the gambling operations were conducted did not comply with the standards set out in *Aguilar v. Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and further explicated in *Spinelli v. United States*, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). These cases hold that an affidavit based solely upon an unidentified informer's tip may provide the probable cause basis for the issuance of a search warrant if the affidavit contains sufficient objective assertions from which a detached magistrate may reasonably conclude that the hearsay should be credited. In these rulings the Supreme Court established a two-prong test for assaying affiants' hearsay statement: (1) the affidavit must present sufficient objective evidence to enable the magistrate to conclude that the unnamed informant is credible or that his information is reliable, and (2) the affidavit must set forth some underlying circumstances which reveal the source of the informer's information pertaining to the criminal activity.

The appellants here do not challenge the sufficiency of the instant affidavit[1] to meet prong (1) — the reliability of the unidentified informer. Rather, they contend that the affidavit in this case fails to satisfy prong (2) — the requirement that the warrant disclose the underlying circumstances from which the

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1 AFFIDAVIT FOR SEARCH WARRANT

STATE OF ALABAMA)
) SS.
COUNTY OF ELMORE)

Willie B. Painter, affiant, being first duly sworn on oath, deposes and says:

(1) That the following property constitutes evidence of criminal conduct: In that the herein described automobiles and real property contains records and other evidence of transactions whereby money or other valuable things may be won or lost upon prize fights, ball games, or other contests or book-making or pool-selling, contrary to Title 14, Sections 261 and 278, Code of Alabama 1940, as amended.

(2) Affiant further says that the above-mentioned property is located at the following described place: 243 Murphy Drive, a residence located in the Scenic Hills section, a residential area located in the Southwest section of Elmore County, Alabama, being the residence of Charles E. Sellers.

One 1971 Pontiac Grand Prix two door sedan, VIN 2765718171502, bearing 1972 Alabama License plate number 29-9109, issued to Charles E. Sellers, Route 5, Prattville, Alabama.

One 1968 Chrysler 300, two door sedan, VIN 3M23K86C201138, being 1972 Alabama License plate number 29-9110, issued to Charles E. Sellers, Route 5, Prattville, Alabama.

(3) Affiant further says that he has probable cause to believe the above-listed property to be searched for and seized is now located upon said described premises, based upon the following facts: Information is that Charles Sellers is operating book from his residence located at 243 Murphy Drive, Prattville, Alabama. He has two telephones listed from this residence as follows: ‡365-6461 and ‡365-8657. Information REFLECTS THAT ‡365-8657 is apparently used for the bookmaking operation.

Toll calls have been made from this number to telephone number 853-1252 in Birmingham fre-

informant drew his conclusion of criminal activity so as to enable independent magisterial evaluation.

The face of the affidavit in the case at bar does not expressly state any source for the informer's information. The government, however, contends that a reading of the entire affidavit discloses sufficient detail to satisfy the alternative prong (2) standard enunciated in *Spinelli* because the affidavit describes the criminal activity "in sufficient detail that the magistrate may know he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli,* 393 U. S. at 416, 89 S. Ct. at 589.

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quently during recent months. Telephone number 853-1252 is in the name of Michael Canon, 1120 B. Florentine Circle, Birmingham, Alabama. This number is an unlisted number. Canon also has telephone service through #853-8751 and Canon is a known gambler.

Telephone number 322-6928 has been called frequently from Charles Sellers residence number. This number is in the name of Anthony Ippolito at 2646 Milner Court, Birmingham, Alabama. Ippolito also has #324-7195. Frequent calls have been made from telephone number 365-8657 to telephone number 853-8751 in Birmingham.

Information is that Canon and Ippolito are furnishing the line to Charles Sellers on basketball games at the present and on football and baseball games during the season. Sellers in turn furnishes the line to local bookmakers in the Montgomery area. Canon and Ippolito reportedly are handling layoffs for Charles Sellers.

The above information was supplied by an informant who has given reliable information in more than one hundred instances in matters of investigation.

Though appellants quarrel somewhat with the *Spinelli* premise that a sufficiently detailed affidavit may support the inference that the informant gained his information in a reliable way, their principal argument is that the affidavit in this case does not meet that standard. They contend that the affidavit here is little more detailed than the one found defective in Spinelli and that the objective facts set out do not support the requisite inference. We disagree. As did the affiant in *Spinelli,* the affiant here, Mr. Painter, asserted that two telephones were located on the premises to be searched and that an informer who had proven to be exceptionally reliable had stated that the suspects were operating a gambling enterprise. Unlike the affiant in *Spinelli,* however, Mr. Painter did not content himself with a mere conclusory statement that the defendants were conducting a gambling operation. Instead, he went on to outline the administrative hierarchy of the bookmaking operation to the magistrate by swearing that he had been told that two of the individuals furnished "the line" to and "handled layoffs" for the third, and that the third individual disseminated "the line" locally. These detailed statements relating to the organizational procedures of the gambling operation provided a basis from which a detached judicial officer could reasonably infer that the informant must have had specific and direct knowledge of this particular bookmaking operation. In addition, Mr. Painter disclosed to the magistrate that he was advised that two telephones were maintained at each of two other specified addresses and that frequent long distance toll calls were made between all three addresses. He also stated that the telephone service at one of the addresses was in the name of Michael Canon, and opined that Canon

was a known gambler. A magistrate could have reasonably inferred from his wealth of detail as to the inter-use of these telephones that the information was the product of the informer's personal knowledge or that the informer had access to and had examined telephone survey records.

Moreover, common sense impells the conclusion that when a confidential informer is shown to be unusually reliable, the magistrate may place added credibility in such information in the affidavit as reveals the precise source of informer's knowledge. The affidavit before us here recites that the informant had furnished reliable information on more than one hundred occasions.[2] In cases where the affidavit presents such cogent assertions of reliability the quantum of underlying circumstances which reveal the source of the informer's knowledge necessary to sustain the affidavit is clearly less than in cases where the indicia of informer reliability is less dramatic. In sum, either of the two objective standards from which the magistrate is to judge the worth of the hearsay may support, although it may not displace, the other. *See United States v. Crawford*, 462 F. 2d 597 (9th Cir. 1972); *cf. United States v. Roth*, 391 F. 2d 507, 511 n. 5 (7th Cir. 1967). While the instant case is both a unique and close one, on these facts we hold that the face of the affidavit properly permitted the magistrate to infer that sufficient probable cause was shown to justify the issuance of a search warrant.

It is not the intent of the *Aguilar* and *Spinelli* decisions to make it difficult for a policeman to get a warrant if in fact he has probable cause.

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2. As it turns out, the unnamed informant was a Special Agent of the Federal Bureau of Investigation.

> On the contrary, the cases contemplate that an affiant with some basic understanding of the law can get a warrant if he has probable cause and simply sits down and explains why. Accordingly, we have evaluated the warrants in this case not under technical requirements but against the benchmark cases that the Supreme Court has indicated we should use. In doing so, we have construed the preference for searches under warrants to imply that the benchmark cases are concerned with practical inferences that may be taken from the facts as a whole.

Gonzales v. Beto, 425 F. 2d 963, 970 (5th Cir. 1970) (footnote omitted).

State Search Warrants and Federal Rule 41 — Relying on this court's recent opinion in *United States v. Brouillette*, ... F. 2d ..... (5th Cir. 1973) [No. 72-2456, May 15, 1973], which held that a warrant may be issued by a United States Commissioner to federal officers only upon a showing of probable cause to believe that a federal crime has been committed, the appellants mount a second, more technical, attack on the state court search warrant. They contend that the fruits of the search, conducted under authority of the warrant issued by an Alabama judge on a probable cause showing of a breach of Alabama law, but not federal law, are not admissible in a federal prosecution. This somewhat startling contention is based on the premise that the federal involvement in this particular search made it equivalent to a federal search and thus subjected it to the technical requirements of Rule 41 of the Federal Rules of Criminal Procedure,[3] including the *Bro illette* requirement

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3. At the time of the issuance of the warrant the relevant portion of Rule 41 read as follows:

RULE 41.
SEARCH AND SEIZURE

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., § 957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

that the warrant only issue upon a showing sufficient to establish probable cause to believe a *federal crime* has been committed.

Despite the government's contention that the fact is otherwise, we assume for the purpose of this decision that there was sufficient federal involvement to require that the search be treated as a federal search.[4]

At the same time we note that there is no suggestion that the state participation in the search was not a bona fide effort to secure evidence of a violation of state law for use in a state prosecution.

In *Navarro v. United States,* 400 F. 2d 315 (5th Cir. 1968) (hereinafter *Navarro I*),[5] this court held that the fruits of a search conducted jointly by federal and state officers pursuant to a state warrant were improperly admitted into evidence in a federal prosecution since the warrant was not issued by a "court

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4. The proof discloses that the informant was an active federal official and that this informant and one other such official accompanied state officers to the premises and participated in certain phases of the search process. After a successful state prosecution based upon the evidence disclosed by the search, the instant federal charges were filed.

5. In United States v. Navarro, 429 F. 2d 928 (5th Cir. 1970), however, this court held that the use in a subsequent state court prosecution of the physical evidence discovered by the state officers during the joint search should not be enjoined, though the federal officers were not allowed to testify as to the fruits of their search. Finally, in United States v. Navarro, 441 F. 2d 409 (5th Cir. 1971), we held that an officer who was a state agent at the time of the search could testify as to the fruits of the search at the state trial despite the fact that he had subsequently accepted employment by the federal government.

of record" as then required by Rule 41.[6] The question presented here, where the search was conducted by federal and state officers under the authority of a warrant issued by a state court on the affidavit of a state officer which avered that evidence of a state crime might be found, is whether *Navarro I* requires the suppression of the fruits of that search in a federal prosecution because the warrant was not secured through procedures which complied in all respects with the requirements of Rule 41.

Properly read, Rule 41 grants the authority to designated judicial officers, federal and state, to issue federal search warrants. The authority granted to state courts under this rule is *in addition* to the state-vested power of those courts to issue a warrant upon a showing that probable cause exists to believe a violation of state law has occurred. While Rule 41 sets out the procedure to be followed in issuing a warrant for a violation of federal law, it obviously should not be contemplated that the federal rule would purport to regulate the procedures through which state courts may issue search warrants predicated on violations of state law.

A federal court reviewing the sufficiency of a warrant issued by a state court, for the purpose of determing whether the fruits of a resulting search are lawful and hence admissible in a federal prosecution, must determine whether the warrant was issued as a federal warrant or as a state warrant. If the warrant was issued under authority of Rule 41 as a federal warrant clearly it must comply with the requirements of the rule. If, however, the warrant was issued under

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6. The 1972 amendments to Rule 41, effective October 1, 1972, omit the court of record requirement.

authority of state law then every requirement of Rule 41 is not a *sine qua non* to federal court use of the fruits of a search predicated on the warrant, even though federal officials participated in its procuration or execution. The products of a search conducted under the authority of a validly issued state warrant are lawfully obtained for federal prosecutorial purposes if that warrant satisfies constitutional requirements and does not contravene any Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers.

Navarro I established that the "court of record" requirement of Rule 41 was a substantive standard by which the conduct of federal searches should be measured rather than any mere procedural standard. Our holding today must not be construed as a retreat from the principle of that case. It is, rather, a refusal to extend *Navarro I* beyond the limits of common sense.

The requirement of Rule 41 (before it was amended) that warrants be issued only by "courts of record" apparently reflected an intent that federal searches were not to be conducted on the authority of search warrants issued by state tribunals whose functions are so limited that they have not been made courts of record.[7] *Navarro I* accomplished this purpose, through the use of this court's supervisory power, by excluding from federal prosecutions the fruits of searches conducted with federal officers participation.

No such useful purpose could be served, however, by a declaration that state warrants must be issued only to investigate federal crimes if federal officers

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7. See *Navarro I, supra*, 400 F. 2d at 318 n.2.

may be present when the search is conducted. In a case where sufficient evidence of any federal crime is lacking, as it was apparently lacking in the case *sub judice*, cooperating officials would be completely unable to comply with such a rule. The fault which the appellants urge us to declare could not be avoided by procuring the warrant from another court.[8] The only effect of such a requirement on the conduct of federal officers would be to preclude federal cooperation and participation in any warranted search conducted by state officers for state purposes. We decline to hold that such an anomalous and baseless rule was ever intended by Rule 41. *Navarro I* certainly intended no such result. To the contrary, it stated:

> We do not mean to suggest in any way that we would discourage cooperation between federal and state law enforcement officers.

400 F. 2d at 319.[9]

The proper test to be applied is whether a particular Rule 41 standard is one designed to assure reasonableness on the part of federal officers, or whether the provision merely blueprints the procedure for issuance of federal warrants. The case *sub judice* presents a paradigm of the latter class of requirements. The federal crime essential of *Brouillette* is a recognition of the inherent limits of the authority granted by

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8. Compare *Navarro I.*

9. *Brouillette* also recognized the necessity of federal-state coadjuvancy.

> After all, under the system of federalism, there is room for dual state-federal activity. Federal officials often refer information they have received to state officials for possible prosecution.
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> ..... F. 2d at ..... [slip op. at 10].

Rule 41 to federal and state magistrates to issue federal search warrants. It does not exist to limit the activities of federal officers when they cooperate with state officers. We decline to apply this particular Rule 41 requirement to state warrants. The contention that the fruits of this joint federal and state search should be suppressed is without merit.

Moreover, we specifically decline to adopt any rule under our supervisory power that would require that state court warrants meet all of the Rule 41 procedural requirements whenever federal officers have sufficient evidence of federal law violations to obtain a federal warrant.[10] Such a rule would not only serve no useful purpose, but it would also place officers acting jointly on the horns of a dilemma in deciding whether to charge a state or federal crime. Such officials should be free to make a considered choice based on the best available information and unencumbered by merely-technical procedural rules.

"Transmission" under the Statute

Appellant Carr, conceding for the sake of argument that the evidence established that wagers were received by telephone from out-of-state betters, nevertheless contends that the government failed to establish a violation of 18 U. S. C. § 1084(a).[11] He bases this argument on his contention that "transmission" as used in that provision does not embrace the act of

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10. Though some of the testimony in this case indicates that the federal officers suspected a violation of federal law, we are unable to determine from the record before us whether the officers had sufficient evidence to have secured a federal warrant.

11. Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the trans-

receiving. For this proposition he cites *United States v. Stonehouse*, 452 F. 2d 455 (7th Cir. 1971), and *Telephone News Systems, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N. D. Ill. 1963) (three judge court) (dicta), *aff'd per curiam*, 376 U. S. 782, 84 S. Ct. 1134, 12 L. Ed. 2d 83 (1964), both of which lend some support to his contention. In *Sagansky v. United States*, 358 F. 2d 195, *cert. denied*, 385 U. S. 816, 87 S. Ct. 36, 17 L. Ed. 2d 55 (1966), however the First Circuit reached a contrary result.

> While this might be a proper construction of the term "transmission" taken out of context, §1084(a) does not punish the mere transmission of bets or wagers, but rather the "use" of interstate wire communication facilities for their transmission. When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of the statute to hold that he has "used" the facility for the transmission of bets or wagers.

358 F. 2d at 200. The First Circuit's interpretation has recently found favor in the Tenth Circuit, which gave the statute a similar reading in *United States v. Tomeo*, 459 F. 2d 445, *cert. denied*, ... U. S. ....., 93 S. Ct. 232, ... L. Ed. 2d ..... (1972).

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mission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

> In reaching this conclusion we give consideration . . . to the fact that the telephone is designed for a two-way conversation and exchange of information. If we were to accept the appellant's contention, we would effectively deny that any discussion or exchange took place, and we find that assumption rather strained. We also note that an interpretation of use of the wire facility which is limited to the isolated *sending* of messages does not meet the basic purpose of the statute and renders its scope more limited than an everyday experience with the telephone would dictate. The statute deals with bookmakers—persons "engaged in the business of betting or wagering." Bookies *take* bets, they receive them, they handle them; it is a transaction requiring mutuality or a meeting of minds. It is unlikely in framing section 1084(a) that Congress considered betting transactions to move in but one direction in the use of the telephone.

459 F. 2d at 447. Aligning ourselves with the views of the First and Tenth Circuits, we conclude that the statute properly construed reaches the activities of these professional gamblers who, as the jury found, conducted their activities through the use of interstate telephone facilities, regardless of which party sent and which received the wager.

Sufficiency of the Evidence as to Carr

Next, Carr contends that, even if the evidence was sufficient to support a jury finding of his involvement in an intrastate gambling operation, the government failed to show that he personally knew of the interstate character of the enterprise. The contention is not well taken.

The proof in this case was overwhelming that tele-

phone calls were received from an out-of-state bettor. Moreover, if the statute requires actual knowledge of the non-local origin of such telephone transmissions,[12] it is clear that at least one or more of the participants in the enterprise knew that calls were received from Kosciusko, Mississippi. It was not necessary that the Government prove that Carr had actual intent to violate federal law, in light of the more-than-sufficient proof that he aided and abetted the state law violation.

> There must exist a community of unlawful intent between the accessory and the perpetrator of the crime, but "* * * an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him." 22 C. J. S., Criminal Law, § 92, p. 164.

Russell v. United States, 222 F. 2d 197, 199 (5th Cir. 1955); *McClanahan v. United States,* 230 F. 2d 919, 924 (5th Cir.), *cert. denied,* 352 U. S. 824, 77 S. Ct. 33, 1 L. Ed. 2d 47 (1956). *See also United States v. DeLaMotte,* 434 F. 2d 289 (2d Cir. 1970), *cert. denied,* 401 U. S. 921, 91 S. Ct. 910, 27 L. Ed. 2d 825 (1971).

Carr's reliance on *Grimes v. United States,* 379 F. 2d 791 (5th Cir.), *cert. denied,* 389 U. S. 846, 88 S. Ct. 104, 19 L. Ed. 113 (1967), is misplaced. In that case the aiding and abetting conviction was reversed, not for lack of knowledge that a gambling associate had traveled interstate, but expressly because the proof did not show Grimes had counselled or as-

12. *Compare* United States v. Swank, 441 F. 2d 264 (9th Cir. 1971).

sisted that activity. Reading that case with this Court's opinion in *Russell* and *McClanahan,* as we must, it is apparent that the interstate activity proven in *Grimes* was implicitly held not to be a natural or probable result of Grimes' participation in the illegal local gambling operation. In the case at hand, Carr is bound to have known that it was most natural and highly probable that an operation of this magnitude would receive at least one interstate call.

The Unabridged and Unexpurgated Tapes

Finally, the appellants urge reversal on the ground that during its deliberations the jury was improperly permitted to listen to certain recorded tapes, only portions of which had been admitted into evidence. After determining that at least some members of the jury had listened to substantial portions of the tapes which were not properly before them, the trial judge denied the appellant's motion for a mistrial, finding that appellants had suffered no prejudice and that the error, if any, was the fault of appellants' trial counsel.

The trial judge, through the bailiff, specifically advised the attorneys for each of the defendants and the Government that it was their responsibility to review the exhibit that had been placed in the hands of the clerk for the purpose of seeing that no exhibits not admitted into evidence went to the jury. Though appellants apparently recognize that ordinarily a failure of counsel to comply with such an order would provide them with no basis for objection, *see Dallago v. United States,* 427 F. 2d 546, 554 (D. C. Cir. 1969), and *United States v. Strassman,* 241 F. 2d 784, 786 (2nd Cir. 1957), they argue on this appeal that they were misled by the statements of the Government attorney. As the transcript of the trial court's inquiry

into this question reveals, one of the attorneys for the appellants stated to the Government attorney that he was concerned about the tapes going to the jury room. The Government attorney responded that although the entire tape had been placed in the recorder, it was set so that the portion of tape that had been admitted into evidence would play when the machine was turned on. The counsel for the appellants acquiesed in this procedure, and the tapes were sent to the jury. Some one and a half hours later and before any further word had been received from the jury the defendants' attorney, apparently regretting after reflection his initial decision to furnish the tapes to the jury in this manner, brought the matter to the attention of the court. The court stated that he would inquire of the jury when they returned a verdict as to whether they had listened to any unadmitted portions of the tapes.

We need not reach or decide whether the Government's representations were so misleading as to free the defendants of the consequences of their lawyer's choice, because we determine that no prejudice resulted from the jury's exposure to the unadmitted portions of the tapes. Sellers and Sexton did not contest the fact that they operated a bookmaking enterprise, while the evidence as to Carr's participation was overwhelming. The only really contradicted issue at trial was whether the appellants used the telephone in interstate commerce. In its order denying the motions for a new trial, the district court stated:

> This court has very carefully listened to the tape recordings in question and finds that, in addition to some "family talk" and singing and pop music, there is general talk by unidentified men regarding

betting, the recording of sports scores from short-wave radio, the giving of betting lines on basketball games, and a discussion by two unidentified men in which Charles Carr's name is mentioned with reference to a land transaction in Crenshaw County, Alabama. Thus, this court specifically finds that none of the defendants were prejudiced to any degree by the tape recordings in question going to the jury.

After listening to these two tapes, we can reach no other conclusion except that any error was harmless beyond a reasonable doubt. *See Schneble v. Florida*, 405 U. S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972); *Harrington v. California*, 395 U. S. 250, 89 S. Ct. 1726, 23 L. Ed. 284 (1969); *Chapman v. California*, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).[13]

We have considered the other issues raised by the appellants and find them without merit. The convictions appealed from are

AFFIRMED.

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13. In light of this holding that any error was harmless, we need voice no opinion as to whether, when a motion to retrieve the tapes had been properly presented, the trial judge would have committed error if he had not taken immediate action to retrieve the tapes. It is possible that such action would have prevented what ultimately transpired in the jury room; on the other hand, it might well have only emphasized to the jury that certain evidence, probably unfavorable to the defendants, was being withdrawn from their consideration. No contemporaneous recording was made of the colloquy between counsel and the trial judge as to this matter. However, it appears that defense counsel acquiesced in the trial court's suggestion that no action be taken pending the jury verdict.

APPENDIX II

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3733

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES E. SELLERS, JR., CHARLES SEXTON and CHARLES H. CARR,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC
(Opinion July 26, 1973, 5 Cir., 1973, ... F. 2d .....).

(November 7, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.